STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 15, 2005
v	No. 255257 Wayne Circuit Court
TAVARIS MARKEITH BLANKS, Defendant-Appellant.	LC No. 03-013651-01

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of armed robbery, MCL 750.529, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 16-1/2 years to 40 years in prison for the armed robbery conviction and two years in prison for the felony-firearm conviction. We affirm.

On May 26, 2002, the victim and her thirteen-year-old son drove to a gas station in Detroit. The victim, who was seven months pregnant, remained in the driver's seat of the vehicle while her son was inflating the tires on the driver's side. After the victim saw a car slowly circle the area several times, a man approached her vehicle. The man leaned through the open passenger window and pointed a gun at the victim. The man demanded the victim's purse, and she complied. The victim and her son recalled that the robber had a tattoo of cursive writing on the left side of his neck, and they provided descriptions of the car that had circled the area. Two days later, the victim and her son went to a Secretary of State office to replace the victim's driver license. While waiting, the victim saw defendant in line in front of her and identified him as the robber. Her son also identified defendant as the robber. They saw defendant drive away in the same car they had seen circling the gas station before the robbery.

Defendant first argues that he was denied the effective assistance of counsel because trial counsel employed a method of jury selection that violated MCR 2.511(F). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the

proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *LeBlanc*, *supra* at 578. In order to establish that counsel was ineffective in the instant case, defendant must show that he would have been acquitted if trial counsel had conducted jury selection in conformity with MCR 2.511(F).

During the first round of peremptory challenges, defense counsel exercised three peremptory challenges. During a subsequent round of peremptory challenges, the prosecutor exercised three challenges. Defense counsel exercised two peremptory challenges during another round. During each of these rounds, the venirepersons were excused and replaced as a group.

MCR 2.511(F), which governs the replacement of challenged jurors, provides that after "a peremptory challenge exercised, another juror must be selected and examined before further challenges are made." MCR 2.511(F) "contemplates the seating and examination of a panel of potential jurors equal in size to the jury that will hear the case." *People v Miller*, 411 Mich 321, 325-326; 307 NW2d 335 (1981).[1] The requirement that another juror must be seated after each challenge must be followed. *People v Glover*, 154 Mich App 22, 44; 397 NW2d 199 (1986). Accordingly, use of the "struck jury method"[2] or any variation thereof is disapproved. *Miller*, *supra* at 325-326.

Because the panel of potential jurors was equal in size to the jury that would hear the case, the method employed in this case was not the impermissible struck jury method or even a variation thereof. Although a technical deviation of MCR 2.511(F), the method employed was acceptable in light of MCR 2.511(A)(4), which provides: "Prospective jurors may be selected by any other fair and impartial method directed by the court or agreed to by the parties." MCR 2.511(A)(4) "provides considerable latitude in the method used by courts to select juries as long as the procedure is fair and impartial." *Green*, *supra* at 45. The jury selection procedure used in this case did not impermissibly infuse the process with predictability because the record does not indicate that the identity of the next prospective juror was certain. See *id*. at 47. Therefore, the jury selection process was a fair and impartial means of selecting a jury and did not deprive defendant of a fair trial. Because defense counsel is not required to make futile objections, we find that defendant's argument is meritless. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002).

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[1] Although *Miller* was analyzing the predecessor to MCR 2.511(F), GCR 1963, 511.6, the rules are identical in their operative terms, and the prohibition against the "struck jury method" is still valid. *People v Green* (*On Remand*), 241 Mich App 40, 43 n 3; 613 NW2d 744 (2000).

[2] Stated most simply, "[t]he 'struck jury method' entails calling a large number of jurors at once. The prosecution and defense then alternately 'strike' jurors until only the requisite number of jurors remain." *People v Green* (*On Remand*), 241 Mich App 40, 43 n 2; 613 NW2d 744 (2000).

Defendant claims that there was insufficient identity evidence to support his convictions. We review de novo challenges to the sufficiency of the evidence in criminal trials to determine whether, viewing the evidence in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002). We review for clear error a trial court's decision to admit identification evidence. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993)(Griffin, J.); *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Clear error exists when the reviewing court is left with a "definite and firm conviction that a mistake has been made." *Kurylczyk, supra* at 303; *Harris, supra* at 51.

Defendant argues that the descriptions of the robber's height provided by the victim and her son were too inaccurate to be reliable. Although the victim estimated that the robber was 5'5" to 5'7," her son believed he was "a little bit" taller than he was at 5'8-1/2" or 5'9". Defendant is 6'1". Therefore, the discrepancy is not significant. The victim also got a good look at the robber at the Secretary of State and immediately recognized him, even before her son pointed out the tattoo. Lastly, although their descriptions of the color of the vehicle included "yellowish-green," "green," "lime green," and "dark green," the fact remains that defendant drove a vehicle that was described by the police as a "funny green" color. The Court should not interfere with the jury's role in determining the weight of evidence or the credibility of a witness. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Absent exceptional circumstances, issues of witness credibility are for the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

Defendant also challenges the reliability of the identifications made by the victim and her son at the Secretary of State office on the basis that they were exposed to suggestive identification procedures. In support, defendant cites case law stating that due process is denied when identification procedures are unnecessarily suggestive and conducive to irreparable misidentification and that an identification procedure will be set aside as impermissibly suggestive when it can give rise to a substantial likelihood of misidentification. The danger is that an initial improper identification procedure may result in misidentification and will unduly influence any later identification. *People v Gray*, 457 Mich 107, 112; 577 NW2d 92 (1998). However, each of the cited cases dealt with circumstances where the victim was asked by the police to identify the defendant. The victim and her son spontaneously identified defendant at the Secretary of State office with no prior suggestion or prompting by law enforcement.

The identifications at issue also satisfy the totality of the circumstances test for determining whether a proposed in-court identification has an independent basis. *Gray, supra* at 115-116; *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977). Neither the victim nor her son had ever met defendant before the robbery. They got a good look at the robber on a sunny day when he was no more than a car width away from both of them. The identifications occurred two days after the robbery. Although the victim's estimate of the robber's height did not match defendant's height, her son's estimate was relatively close. They were both accurate in identifying defendant's tattoo, and they were close on the color of his vehicle. Neither the victim nor her son had previously identified another person as the robber. The victim and her son were both scared during the robbery. The totality of the circumstances therefore indicates that the identifications were proper. Thus, there was sufficient evidence adduced at trial regarding defendant's identity as the perpetrator of the robbery to support his convictions.

Defendant also argues that the trial court erred in not dismissing the charges because the prosecutor violated the 180-day rule. This issue presents a legal question that we review de novo. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

The 180-day rule, which is contained in MCL 780.131 and MCR 6.004(D), requires the prosecutor to bring an inmate to trial within 180 days of receiving notice of the inmate's incarceration in a state prison. *People v Smielewski*, 235 Mich App 196, 198; 596 NW2d 636 (1999). The rule does not require that trial be commenced or concluded within the 180-day period, only that the prosecutor make a good faith effort to bring the case to trial within that period. *People v Hendershot*, 357 Mich 300, 303-304; 98 NW2d 568 (1959); *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). The record reflects that the prosecution did not receive notice of defendant's incarceration until August 2003. Thus, there was no violation of the 180-day rule because defendant's preliminary examination was conducted on December 8, 2003, within 180 days of when the prosecution received notice of defendant's incarceration. See *People v Finley*, 177 Mich App 215, 219-220; 441 NW2d 774 (1989).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder